No. 11,533

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

STEPHEN SORRENTINO, also known as Vincent Sorrentino,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the District Court of the United States for the Northern District of California, Southern Division.

APPELLANT'S PETITION FOR A REHEARING.

WALTER H. DUANE,
790 Mills Building, San Francisco 4,
Attorney for Appellant and Petitioner.

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Subject Index

Table of Authorities Cited

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To the Honorable Francis A. Garrecht, Presiding Judge, and to the Honorable Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Comes now the appellant above-named and respectfully petitions this Honorable Court for a rehearing of the appeal in the above-entitled cause and, in support of this petition, represents to the Court as follows:

Appellant, in his brief and at the oral argument, contended that the trial court erred "in refusing to allow appellant to propound questions on cross-exam-

ination relating to the informer and Jerome Berry." With that contention this Court fully agreed, stating in its opinion that "Information as to this person's [the informer's] identity was * * * material to appellant's defense, and appellant was entitled to a disclosure thereof. Hence the court erred in sustaining the objection." (Slip opinion, p. 4.) This Court, however, held that the "error was harmless" and for that reason affirmed the judgment of the court below. It is respectfully submitted that this Court erred in that conclusion and that the error was indeed harmful for the following reasons:

(1) THE COURT ERRONEOUSLY ASSUMED THAT THE ERROR WAS AS APPARENT TO THE JURY AS IT WAS TO THIS COURT ON EXAMINATION OF THE RECORD.

This Court, in its opinion, reasoned that, since it was clear from the record that Berry and the informer were one and the same person and that Berry owned the house at 1678 Forty-fifth Avenue, all the evidence material to appellant's case had been introduced. In support of its conclusion, the Court referred to certain portions of the record and appellant's brief. The portions of the record selected by the Court to support its conclusions, however, were scattered throughout the record in isolated sentences. At no one place was there a square statement in the record that Berry was the informer or that the house belonged to him. The conclusions reached by the Court and by appellant were reached only after the isolated bits of evidence were culled from the record and carefully pieced together; they were not, and are not, apparent

on the face of the record. Accordingly, there is no reason to suppose that a jury, merely listening to the testimony, was able to arrive at the same conclusions that the attorneys and this Court were able to reach only after an exhaustive study of the printed record.

True, as pointed out in footnote 10 to the opinion of this Court, appellant argued that it was "clear from the record" that Berry was the informer and that the house belonged to him. He did not argue, however, as this Court assumed, that the conclusions were clear to the jury. The argument that the record was plain was made only to show that, as a matter of law, the court below had erred, since the rule that the court applied had no application to the case at bar. It was assumed that, if this Court agreed with appellant, the judgment of the court below would be reversed; for it appeared plain that appellant was prohibited from putting his case simply and plainly before the jury as was his right. As this Court properly pointed out, appellant was entitled to a disclosure of those facts. But he was entitled to more than a mere disclosure; he was entitled to a disclosure in plain and simple form so that the least of the jurors could grasp the significance of the evidence as well as the most alert. The evidence that crept into the record on these points came only indirectly and inadvertently and it is certainly questionable whether any of the jurors grasped the significance of that evidence. For that reason, it is respectfully submitted that the error of the court below was substantial and prejudicial and the judgment, accordingly, should be reversed.

(2) THE EFFECT, IF ANY, OF THE TESTIMONY SUPPORTING APPELLANT'S DEFENSE WAS VITIATED BY THE COURT'S REPEATED RULINGS THAT THE EVIDENCE WAS INADMISSIBLE.

Even assuming that it was clear to the jury from the oral testimony that Berry was the "informer" and that the house in question belonged to him, there is the further question, upon which this Court did not touch, of the effect of the Court's rulings that the testimony was inadmissible. While the effect of those rulings on the minds of the jurors must necessarily be a matter of conjecture, it seems safe to assume that the jurors could only have understood that the testimony was inadmissible and that they should disregard it. In any event, if there is any doubt, it should be resolved in favor of appellant, who, if there is error, will have been wrongfully sentenced to ten years in prison. Furthermore, by the court's rulings, appellant was prevented from making full use of the testimony, whatever there was of it, in his address to the jury. Therefore, even if the testimony was clear, it was vitiated.

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(3) APPELLANT'S RIGHT TO CROSS-EXAMINE THE WITNESSES AGAINST HIM WAS UNLAWFULLY CURTAILED.

Even assuming that the evidence on the question of the identity of the "informer" was clear and apparent to the jury, and even assuming further that the effect of that testimony was not vitiated, there still was reversible error because cross-examination was unjustly curtailed. Every time appellant began to em-

bark on the development of his case by cross-examination, he was stopped by the court below. At no time was he allowed to establish his defense in full. The court below placed a blanket prohibition on appellant's questions regarding the identity of the "informer" without reference to the kind of question and the way the information could be used by appellant. See, for example, the record at page 33 where the court below stated, "I will sustain the objection to any question along that line".

This, in itself, was reversible error; for, as this Court has said, "A full cross-examination of a witness upon the subject of his examination in chief is the absolute right, not the mere privilege, of the party against whom he is called, and a denial of this right is a prejudicial and fatal error".

Cossack v. United States, 63 F. (2d) 511, 516-517.

Furthermore, it is now impossible to tell what else appellant could have shown in his defense if full cross-examination were properly allowed. This Court assumed, in its opinion, that all that appellant could have shown was already disclosed by the record. There is no warrant, however, for this assumption; for there is no telling what further line of defense would have been suggested had cross-examination not been unlawfully curtailed. In a sense, cross-examination is exploratory; for attorneys seldom have an opportunity, in criminal cases, to examine adverse witnesses, and even when such opportunity affords